UNITED STATES OF AMERICA

Before The
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

Media Ownership Regulation	)	FCC Docket 02-277

WRITTEN COMMENTS OF WKJCE
GAY/ LESBIAN / BISEXUAL / TRANSGENDER-TRANSSEXUAL (GLBT) RADIO

WKJCE GLBT RADIO is a former Part 15 radio station, and current Internet broadcaster, based in Kane, Pennsylvania. Over the Internet, we now serve 2 primary constituencies: (1) gay, lesbian, bisexual and transgender/transsexual people, throughout the world, who are seeking a network of mutual support and/or exchanges of information and ideas with others; as well as (2) residents of northwest Pennsylvania, GLBT or otherwise, who are seeking information on local issues, activities and events.

WKJCE GLBT RADIO is also a current applicant for a Low Power FM radio license. Through this license, we plan to increase our service to the residents of Kane, Marienville and other northwest Pennsylvania communities.

As more than 9,000 other parties have done before us, we are now submitting Written Comments in FCC Docket 02-277. Like the vast majority of those more than 9,000 parties, we are strongly opposed to any further relaxation of the FCC's few remaining restrictions on how much of the media a single entity can own. In fact, we urge the FCC to *reverse* the recent trend toward media ownership deregulation.

4 Key Points

We hereby raise 4 brief but important points:

1. Contrary to the interpretations of some individuals, Section 202(h) of the Telecommunications Act of 1996 does *not* establish a presumption that media ownership deregulation must proceed unless most of the evidence goes against it. Section 202(h) does not create a presumption either for or against such deregulation. Rather, it directs the FCC to weigh the evidence every 2 years, without having to meet a burden of proof either way, and to reduce *or increase* media ownership restrictions on the basis of how much competition exists in the media marketplace at the time. High levels of market competition argue for relaxing regulation, while low levels argue for *increasing* it.

2. Despite some rhetorical flourishes, recent D.C. Circuit Court decisions have not challenged the *substantive merits* of past FCC decisions to retain existing media ownership restrictions. Rather, these court decisions have challenged *the analytical processes* underlying these past FCC decisions. The Commission was taken to task for not collecting enough evidence, and also for not analyzing the evidence it had thoroughly enough. If the Commission decides *now* to retain the current media ownership restrictions, or even to expand them, that decision *will* be upheld by the D.C. Circuit *if* the analytical processes have been sufficiently thorough and the evidence has been sufficiently complete. Contrary to the apparent interpretations of some individuals at

the Commission, the D.C. Circuit Court has *not* said to the FCC, in effect: "Either you deregulate media ownership restrictions Your Way, or we'll deregulate them Our Way." Rather, the D.C. Circuit Court has said, in effect: "Whether you relax media ownership restrictions or tighten them, whatever you do had better be based on more evidence, *and* more thoughtful analysis of that evidence, than we saw last time."

3. If the key to legal justification of further media ownership deregulation, under Section 202(h) of the Telecommunications Act of 1996, is the existence of robust marketplace competition, then further relaxation of the remaining media ownership restrictions should be Dead On Arrival at the FCC. There has never been more media consolidation in American radio than we see today -- and already Clear Channel Communications, and others, are talking about acquiring *still more* radio stations if the current ownership restrictions are eased or lifted. Consolidation in other media industries is less pronounced, but is still too high for comfort, and the differences in consolidation are probably due to the fact that these other media industries are not yet as deregulated as radio has been.

4. With respect to the FCC's assessment of how much competition exists:

(a) The radio industry data is hopelessly skewed by its failure to take into account the FCC's October 11, 2002 "interim" authorization, in FCC Docket 99-325, of In Band On Channel (IBOC) Digital Radio broadcasts. IBOC broadcasts need 50%

more bandwidth than Analog Radio broadcasts, thereby reducing available frequencies on the radio spectrum to two-thirds of their present level. This means that yet another round of consolidation, in this case technologically induced, is about to hit the radio industry. Yet *none* of the FCC's 12 studies of marketplace competition in this Docket take into account the future disappearance of one third of the radio spectrum as a directly foreseeable consequence of IBOC operations. This is an oversight so huge that it has to constitute a fatal flaw in any analysis which concludes that marketplace competition is adequate in the radio industry.

(b) WKJCE GLBT RADIO is also distressed to see the FCC relying upon a study which measures current competition and consolidation in the radio industry by taking the averages from a 30-year data base. Every student of Communications 101 in the entire nation knows by now that there has been a *radical* increase in radio industry consolidation during the last 6 years: that is, since the initiation of mandatory auctions for commercial radio licenses and the enactment of the Telecommunications Act of 1996. Burying data from the last 6 years, within the folds of a 30-year data base, is clearly disingenuous, directly invalidating the study and calling into question how credibly the Commission's 11 other studies can be viewed.

(c) WKJCE GLBT RADIO further questions the repeated expression of conclusions about the level of competition *within* a media industry on the basis of the level of competition *between* different media industries.

For one thing, it is unreasonable to throw *non*-broadcasting media options, such as cable TV and The Internet, into the same "basket" of consumer choices with broadcasting media options. The latter are *free* to consumers, while the former are not. Should the level of choices for radio and TV listeners, at least half of whom cannot afford (or at least do not choose to pay for) cable TV or satellite TV or The Internet, be assessed on the basis of the options available to the most affluent portion of the population? Is it no longer a concern of this Commission "How The Other Half Lives"? And what about the Commission's mandate, in the Communications Act of 1934, to advance the growth of *free* media technologies?

Second, to the extent that radio and TV and cable TV and satellite TV and The Internet are compared as competing options for consumers, it should be noted that all of these options are only *technologically* different. If they all have the same owners, what guarantee do we have that they will be different from each other in the *quality* of their programming? As a *much* more important point: If they all have the same owners, what guarantee do we have that they will be allowed to convey a wide range of ideas and information, even when such ideas and information work against the owners' interests?

(d) Finally, the huge public outcry against further media ownership deregulation should be taken *fully* into account by the Commission.

As of May 29, 2003, over 9,000 formal Written Comments have been filed in FCC Docket 02-277 alone -- with the vast majority of them coming from everyday Americans, saying that "Enough Is Enough" when it comes to media consolidation.

However, according to FCC Commissioner Jonathan Adelstein, this is only the tip of the iceberg. He has reported the following, in recent Press Conferences:

- 250,000 postcards to the FCC
- 100,000 E-Mails to the FCC
- 100,000 E-Mails to Capitol Hill

This is not "mere" public opinion, which should not be allowed to influence a quasi-judicial judgment based on the evidence. In this case, WKJCE submits, such public opinion is itself *part* of the evidence -- and a *large* part of the evidence at that.

After all, the basic question here is whether competition in the media marketplace is currently robust enough to justify further media ownership deregulation. If that is the key question, who would know the answer better than *the customers?*

Their answer is obvious -- and that answer, much more than any theoretical or historical study, is *evidence.* It should be honored as such.

Primary Sources

All of these points have already been brought to the FCC's attention in other, longer documents. It has been WKJCE's privilege to condense them into 7 pages -- for easier reading by the Commission, future litigants and other interested parties.

For restatements and refinements, and other developments of these basic points, WKJCE GLBT RADIO recommends reviewing the following filings in this Docket:

1. Reply Comments Of THE AMHERST ALLIANCE: February 1, 2003
Study-by-study responses to the FCC's 12 studies on media consolidation
RE: Points 3, 4(b) and 4(c)

SEE ALSO -- Appendix I, "What Section 202(h) Actually Requires":
A January 31, 2003 Legal Analysis conducted for THE AMHERST ALLIANCE by Don Schellhardt, Esquire
RE: Points 1 and 2

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2. Testimony For Richmond Hearings By CHRISTOPHER MAXWELL, Vice President of VIRGINIA CENTER FOR THE PUBLIC PRESS: , February 26, 2003
RE: Point 4 (a)

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3. Letter To The FCC From THE AMHERST ALLIANCE: May 15, 2003
RE: Point 4(c) and 4(d)

Conclusion

For the reasons we have set forth herein, WKJCE GLBT RADIO urges the Federal Communications Commission to: (1) refrain from *any* further movement toward *any* additional media ownership deregulation; and (2) begin the process of taking action to *restore* a higher level of media ownership regulation, based upon a finding, pursuant to Section 202(h) of the Telecommunications Act of 1996, that current levels of media marketplace competition are dangerously low, due to excessive media consolidation.

Respectfully submitted,

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